

**A Michael Lee Fook Wah v Minister of Human
Resources Malaysia & Anor**

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-01-140
OF 1995

B SHAIK DAUD, ABU MANSOR AND MOKHTAR SIDIN JJCA
11 NOVEMBER 1997

Administrative Law — Remedies — Certiorari and mandamus — Refusal of Minister to refer complaint to Industrial Court — Whether discretion exercised — Whether certiorari and mandamus should issue

C Labour Law — Industrial Court — Discretion of Minister — Refusal to refer complaint to Industrial Court — Application for certiorari to quash decision — Whether discretion properly exercised — Industrial Relations Act 1967 s 20(3)

D The appellant was appointed the General Sales Manager of Guinness Malaysia Sdn Bhd on 1 September 1986. Around November 1989, Guinness Malaysia Sdn Bhd merged with Malayan Brewery Bhd, resulting in the formation of Guinness Anchor Bhd ('the second respondent'). After the merger, the appellant continued his employment in the second respondent as General Manager Sales. On 18 December 1992, the appellant was informed that his position had become redundant and that his services would be terminated from 1 February 1993. The appellant argued that the reasons given for the termination were untenable and that he was victimized and made a subject of unfair labour practice. He further contended that he was dismissed without just cause under the guise of a restructure exercise. The Director General of Industrial Relations decided under s 20(3) of the Industrial Relations Act 1967 ('the Act') that the appellant's complaint was not fit to be referred to the Industrial Court. The appellant made an application to the High Court against the Minister of Human Resources ('the first respondent') for an order of certiorari and mandamus to quash his decision. The grounds set out were that (i) the first respondent had acted ultra vires and abused his statutory discretion by not referring the matter to the Industrial Court, and (ii) the first respondent had failed to investigate and evaluate all facts. The High Court dismissed the application. The appellant then bought this appeal to the Court of Appeal.

H Held, dismissing the appeal:

I In an application for an order of certiorari, the High Court is not sitting in its appellate jurisdiction but in its supervisory jurisdiction. The court is more concerned with the decision-making process and not the decision itself. The court should not readily question the administrative decision of the first respondent as that is his absolute discretion. Furthermore, the law does not require the first respondent to refer every matter to the Industrial Court. Section 20(3) of the Act confers a discretion on the first respondent whether to refer a complaint

to the Industrial Court or not, which will depend on the facts and circumstances of each case. The court will only interfere when it can be shown that the discretion was exercised unlawfully. A negative act, such as not referring the complaint to the Industrial Court, is equally an exercise of discretion. On the facts of the case, the first respondent's discretion was exercised according to the scheme and intention of the Act, after a thorough study of all relevant material. The decision was fair and just and the court should not interfere (see pp 309D-E, I, 310A, C-D and 311C); *National Union of Hotel, Bar & Restaurant Workers v Minister of Labour and Manpower* [1980] 2 MLJ 189 followed.

[Bahasa Malaysia summary]

Perayu dilantik sebagai Pengurus Besar Jualan Guinness Malaysia Sdn Bhd pada 1 September 1986. Sekitar bulan November 1989, Guinness Malaysia Sdn Bhd telah bercantum dengan Malayan Brewery Bhd, menyebabkan penubuhan Guinness Anchor Bhd ('penentang kedua'). Selepas percantuman, perayu meneruskan pengajiannya di penentang kedua sebagai Pengurus Besar Jualan. Pada 18 Disember 1992, perayu diberitahu bahawa kedudukannya telah menjadi berlebihan dan bahawa perkhidmatannya akan diberhentikan mulai dari 1 Februari 1993. Perayu menghujahkan bahawa alasan-alasan yang diberikan untuk pemberhentian tidak dapat dipertahankan dan bahawa dia telah ditindas dan dijadikan mangsa amalan buruh yang tidak adil. Beliau seterusnya menghujahkan bahawa dia dipecat tanpa alasan yang munasabah di bawah samaran latihan penyusunan semula. Ketua Pengarah Perhubungan Perindustrian memutuskan di bawah s 20(3) Akta Perhubungan Perindustrian 1967 ('Akta tersebut') bahawa aduan perayu tidak wajar dirujuk kepada Mahkamah Perusahaan. Perayu membuat permohonan kepada Mahkamah Tinggi terhadap Menteri Sumber Manusia ('penentang pertama') untuk satu perintah certiorari dan mandamus untuk membatalkan keputusannya. Alasan-alasan yang dinyatakan adalah bahawa: (i) penentang pertama telah bertindak ultra vires dan menyalah guna budi bicara statutori beliau dengan tidak merujuk perkara itu kepada Mahkamah Perusahaan; dan (ii) penentang pertama telah gagal menyiasat dan menilai kesemua fakta. Mahkamah Tinggi menolak permohonan. Perayu kemudiannya membawa rayuan ini kepada Mahkamah Rayuan.

Diputuskan, menolak rayuan:

Dalam sesuatu permohonan untuk perintah certiorari, Mahkamah Tinggi tidak bersidang dalam bidang kuasa rayuan tetapi dalam bidang kuasa penyeliaan. Mahkamah lebih mementingkan proses membuat keputusan dan bukan keputusan itu sendiri. Mahkamah tidak harus mempersoalkan keputusan pentadbiran penentang pertama kerana ianya merupakan budi bicara mutlak. Tambahan pula, undang-undang tidak menghendaki penentang pertama merujuk

- A setiap perkara kepada Mahkamah Perusahaan. Seksyen 20(3) Akta tersebut mengurniakan budi bicara kepada penentang pertama tentang sama ada untuk merujuk suatu aduan kepada Mahkamah Perusahaan atau tidak, yang akan bergantung kepada fakta-fakta dan keadaan setiap kes. Mahkamah hanya akan campur tangan apabila ia boleh ditunjukkan bahawa budi bicara dilaksanakan secara tak sah. Tindakan negatif, seperti tidak merujuk aduan kepada Mahkamah Perusahaan, dalam cara yang sama merupakan tindakan pelaksanaan budi bicara. Atas fakta-fakta kes, budi bicara penentang pertama dilaksanakan menurut skim dan hasrat Akta tersebut, selepas kajian yang teliti ke atas material yang relevan. Keputusan adalah adil dan saksama dan mahkamah tidak patut mengganggunya (lihat ms 309D-E, I, 310A, C-D dan 311C); *National Union of Hotel, Bar & Restaurant Workers v Minister of Labour and Manpower* [1980] 2 MLJ 189 diikut.]
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- C

Notes

- D For cases on certiorari and mandamus, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 228-233.
For cases on discretion of Minister to refer complaints to the Industrial Court, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 938-939.

E Case referred to

National Union of Hotel, Bar & Restaurant Workers v Minister of Labour and Manpower [1980] 2 MLJ 189 (folld)

Legislation referred to

- F Industrial Relations Act 1967 s 20(1), (3)

Appeal from: Originating Motion No R3-25-29 of 1994 (High Court, Kuala Lumpur)

- G *Andrew TC Saw and Mazlinda Makhzan* (Ng Yook Woon, *Andrew TC Saw & Co*) for the appellant.
J Christie and Haliza Aini (Senior Federal Counsel, Attorney-General's Chambers) for the first respondent.
Nalini Pathmanathan and K Sivakumar (*Skrine & Co*) for the second respondent.

- H **Shaik Daud JCA** (delivering the judgment of the court): This is an appeal from the decision of the High Court at Kuala Lumpur in dismissing the appellant's application for an order of certiorari and mandamus. The appellant by an ex parte originating motion dated 2 April 1994, applied for an order of certiorari to remove into the High Court for the purpose of it being quashed, the decision of the first respondent dated 23 February 1994 and for an order of mandamus directing the first respondent to exercise his discretion according to law pursuant to s 20(3) of the Industrial Relations Act 1967 ('the Act').
- I

The facts leading to the appellant making the above application are that the appellant was originally appointed the General Sales Manager of Guinness Malaysia Sdn Bhd on 1 September 1986 and continued to hold that appointment until around November 1989. Sometime around November 1989, there was a merger between Guinness Malaysia Sdn Bhd and another prominent brewery, the Malayan Brewery Bhd. This merger resulted in the formation of Guinness Anchor Bhd, the second respondent herein. After the merger, the appellant continued his employment in the second respondent in the capacity of General Manager Sales.

By a letter dated 18 December 1992 from the Personnel Director of the second respondent, the appellant was informed that his position as General Manager Sales had become redundant and that his services would be terminated with effect from 1 February 1993. As General Manager Sales, the appellant received five principal reports from senior managers whose terms with the second respondent, and before that with Guinness Malaysia Sdn Bhd and Malayan Brewery Bhd, exceeded that of the appellant. The second respondent contends that, after the merger, it became clear that the senior managers could function efficiently and independently without having to report to an intermediate, ie the appellant, who was in fact below the Sales Director. The Sales Director was the person who makes the decisions after considering the reports from the General Manager Sales. In the light of this, the position of the General Manager Sales was therefore merely an intermediary from the managerial positions to the Sales Director. As a result, two years after the merger, the second respondent came to the conclusion that in order to achieve greater efficiency and to give independent control of the managerial positions, it would be more economical to do away with the so called intermediary position, namely the General Manager Sales. In view of this, the second respondent declared that the position of General Manager Sales was redundant.

As the appellant's position was made redundant, the second respondent offered a compensation of 21 months salary amounting to RM214,167 and in addition, the appellant was offered the option to purchase the company vehicle which he was then using, valued at RM88,000, at 20% of the discounted price. This offer was made to appellant for his six years and five months term of service with the second respondent. In addition to this, the second respondent was also prepared to offer an additional six months salary. All these offers were outrightly rejected by the appellant. The appellant contends that the reasons given for the disestablishment of his position were untenable and that he was victimized and made a subject of unfair labour practice, and was in fact dismissed without just cause or excuse under the guise of a restructure exercise.

As a result of the termination of his services, the appellant made representations to the Director General of Industrial Relations ('D-G') under s 20(1) of the Act. The D-G, in his effort to effect a conciliation, caused an inter partes meeting on 22 February 1993 between the appellant and second respondent. Apart from this inter partes meeting, the D-G also

A met separately representatives of the second respondent. All these efforts were fruitless.

Then by a letter dated 23 February 1993, the appellant was informed that the first respondent having considered the representation, decided under s 20(3) of the Act that the appellant's complaint was not fit to be referred to the Industrial Court.

B In his application to the High Court, the appellant set out two grounds, namely:

(1) The first respondent had acted ultra vires and/or in excess of and/or without jurisdiction and/or abused his discretion in exercising his statutory discretion by not referring the applicant's matter to the Industrial Court.

(2) The first respondent had refused or otherwise failed to investigate and evaluate all the facts and circumstances surrounding the applicant's dismissal from employment by the second respondent.

D First and foremost, it must be emphasized that in an application for certiorari, the High Court is not sitting in its appellate jurisdiction but in its supervisory jurisdiction. The court is more concerned with the decision-making process and not the decision itself. The court should not readily question the administrative decision of the first respondent as that is his absolute discretion. If the first respondent had acted ultra vires, unfairly or unjustly in exercising his discretion, then it is the duty of the courts to interfere in an application for review of that decision. The underlying principles of judicial review have been stated in a number of cases, and it is the exercise by those with whom discretionary power is vested, not in the courts, that the courts are required to review.

F It was argued before us that the first respondent did not consider the complaints by the appellant and the background of the case. With respect, we are unable to agree with this argument. The appellant in his affidavit affirmed on 1 April 1994, himself averred that 'all the relevant facts and evidence in support of every issue raised in my complaint ... had been tendered to the first respondent'. It is not disputed that both sides have presented their case to the D-G and the first respondent, and the same material are before the court. This shows that all the material necessary in respect of the appellant's complaint were before the first respondent. The first respondent in his affidavit affirmed on 10 January 1995, averred that he had considered all relevant materials including the report of the D-G on efforts at conciliation. In para 5 of the said affidavit, the first respondent concluded thus:

I Saya mengesahkan bahawa semua fakta-fakta yang telah dibangkitkan oleh pemohon dan responden kedua di dalam mesyuarat-mesyuarat runding damai tersebut telah dipertimbangkan oleh saya dengan teliti sebelum saya membuat keputusan saya di bawah s 20(3) Akta Perhubungan Perusahaan 1967.

From this, it seems clear to us that the decision of the first respondent not to refer to the Industrial Court was made after a thorough study of all

relevant material and was a fair and just decision. It cannot, therefore, be said that it was a frivolous or vexatious decision. It cannot also be said that the decision was unjust or unfair.

It was also argued before us that when all the materials are before the first respondent, it was his duty to refer the complaint to the Industrial Court and not usurp the function of that court by making his own decision thereon.

With respect, this line of argument seems to suggest that the first respondent is required to refer every complaint referred to him, to the Industrial Court, irrespective of whether it is a fit and proper case to do so. The law does not require the first respondent to do this, otherwise the position of the first respondent vis-a-vis the Act would be that of an intermediary or a mere postman. It is not a mechanical exercise for the first respondent in every case to refer to the Industrial Court. Section 20(3) of the Act provides that '... the Minister may, if he thinks fit, refer the representation to the Court for an award'.

From this, it can be seen that s 20(3) of the Act confers a discretion on the first respondent as to whether or not to refer any particular representation. Whether a reference is made must, therefore, depend on the facts and circumstances of each particular case. The court will only interfere when there is evidence to show that the discretion was exercised unlawfully.

In this respect, we cannot do better than refer to the case of *National Union of Hotel, Bar & Restaurant Workers v Minister of Labour and Manpower* [1980] 2 MLJ 189. In the case, five hotel workers who were union members, and one other worker (a non-union member) were found gambling in the hotel premises. An inquiry was held and they were all dismissed. The non-union member made representations to the Director General of Industrial Relations. He denied that he was gambling. The Minister thereupon referred his case to the Industrial Court as an industrial dispute. The appellants on behalf of the five union members then reported the trade dispute arising from their dismissal to the Minister with a request that it be referred to the Industrial Court. Inquiries were made which revealed that the representatives of the appellants admitted that the five union workers were gambling on the hotel premises. The Minister refused to refer the case to the Industrial Court and the appellants applied for an order of certiorari to quash the decision of the Minister. It was argued that the Minister, in refusing to refer the dispute to the Industrial Court, had failed to take into consideration a similar case (in respect of the non-union member) which was referred to the Industrial Court. It was further argued that the Minister had, therefore, exercised his discretion wrongfully and in a manner not in accord with the policy and scheme of the Act. The application was refused in the High Court and on appeal to the then Federal Court, the appeal was dismissed. The court, inter alia, held that where the Minister is satisfied that it is expedient so to do, he may of his own motion refer any trade dispute to the Industrial Court. This subjective formulation is sufficient to show that the Minister has a discretion to determine the desirability or otherwise of a particular course of action

A within the scope of the discretionary power. The exercise of this discretion is vested in the Minister, not in the courts. When this discretion is challenged, the courts must be vigilant and resist any temptation to convert the jurisdiction of the court to review, into a reconsideration on the merits as if it is an appeal.

B We hold that the very fact that the Minister did not refer per se any particular trade dispute, does not necessarily mean that the Minister has abused his discretion. It is for him to be satisfied that it is a fit and proper case to refer to the Industrial Court. An exercise of a discretion does not always mean that it should be exercised only in a positive manner. A negative act, as in the present case, is equally an exercise of a discretion, provided

C the Minister had considered every aspect of the case. On the facts and circumstances of the present case, we are satisfied that the Minister had exercised his discretion in a manner which was in accord with the scheme and intention of the Act, and as such the court should not interfere.

The appeal is dismissed with costs. We order the deposit to go to the

D respondent to account of costs.

Appeal dismissed.

Reported by David Lai

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